In the present case, the first appellant had not even started working with the respondent. He had not yet been assigned to any division of the Bank. Yet he was already saying the post offered was inconsistent with his qualification. The truth is (as admitted by the first appellant himself) he was not interested in working with the respondent. PW1 had said that there were divisions in the Bank which required people with legal qualifications.

I find that this ground must also fail. In the result the appeal is dismissed with costs.

JEERAM A/L SANJIWI

v.

NATIONAL UNION OF PLANTATION WORKERS

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[ORIGINATING MOTION NO. 25-11-1991]
17 JUNE 1993

ARBITRATION: Application to set aside award of arbitrators - Whether arbitrators had misconducted themselves - Whether award improperly procured - Arbitration Act 1952, s. 24(2).

TRADE UNIONS: Application to Court to set aside award of arbitrators - Domestic remedies available - Domestic remedies not exhausted - Whether application to Court premature.

The respondent union rejected the nomination of the applicant for the post of Chairman of the Kedah, Perlis, Penang State Branch Committee at elections for the term 1989 to 1992. The dispute arising out of the respondent union's rejection of the applicant's nomination was referred to arbitration under r. 32 of the respondent union's rules. The applicant sought to set aside the award of the arbitrators on the grounds that the arbitrators had misconducted themselves within the meaning of s. 24(2) of the Arbitration Act 1952.

The respondent contended that the application before the Court was premature as the award made by the arbitrators was not final and said that the applicant should exhaust his domestic remedies by appealing to the Triennial Delegates' Conference in accordance with r. 32(5) of the union rules.

Held:

[1] Two questions were raised for determination by the parties and the arbitrators took cognisance of them. However the arbitrators did not at all determine the issues raised.

[2] It was not surprising that the arbitrators did not determine the issues as they had not come to grips with the underlying questions relating to the legal effect of the earlier arbitrator's award and the legal effect of the union rules relating to payment of subscriptions and the refusal of the respondent union to accept the fees tendered by the applicant to the respondent union's headquarters.

[3] The award had no answers and no conclusions drawn by the arbitrators in relation to the two questions raised and therefore they had misconducted themselves within the meaning of s. 24(2) of the Arbitration Act 1952. The so called award was void.

[4] Where there is an express provision in the rules that the plaintiff must first exhaust his domestic remedies the Court is not absolutely bound by that because its jurisdiction cannot be ousted, but the plaintiff will have to show cause why the Court should interfere with the contractual position.

[5] Where a domestic tribunal has acted beyond its jurisdiction and its decision is void, the party aggrieved should not be required to exhaust his domestic remedies before coming to Court.

[6] The applicant had shown that the award made by the arbitrators was void and therefore the Court had jurisdiction to entertain the application notwithstanding that the union rules provide for an appeal to the Triennial Delegates' Conference and the applicant did not so appeal to that body.

[Application allowed with costs].

Cases referred to:
White and Ors. v. Kuzych [1951] AC 588 ***(refd)***
Lawlor v. Union of Post Office Workers [1965] 1 All ER 353 ***(refd)***
Leigh v. National Union of Railwaymen and Anor. [1960] 3 All ER 1249 ***(foll)***
B. Mahesan v. K.K. Lim [1987] 2 MLJ 160 ***(foll)***
Tharmalingam v. Sambanthan [1961] MLJ 63 ***(refd)***
Bonsor v. Musicians' Union [1954] 1 All ER 822 ***(refd)***
Tan Toi Lam v. Lai Kee Ying [1975] 1 MLJ 27 ***(foll)***
Official Assignee v. Chartered Industries of Singapore Ltd. [1978] 2 MLJ 91 ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 24(2)
Rules of the High Court 1980, O. 69 r. 2(c)
Trade Unions Act 1959, s. 44
Workmen's Compensation Ordinance 1952
Arbitration Act 1950, s. 23 (UK)

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 2, para 692, 694

For the applicant - Thayalan Muniandy; M/s. Meena, Thayalan & Partners
For the respondent - B. Lobo; M/s. Lobo & Associates

JUDGMENT

K.C. Vohrah J:
This is an application made pursuant to O. 69 r. 2(c) of the Rules of the High Court to set aside under s. 24(2) of the Arbitration Act 1952 an arbitration award dated 6 May 1991 on the grounds that the arbitrators had misconducted themselves and that the award had been improperly procured.

The respondent union is a trade union registered under the Trade Unions Act 1959 and caters to employees employed in the plantation industry. The respondent union has several State Branch Committees. One of the branches is the Kedah, Perlis, Penang State Branch Committee ("the Branch Committee").

Elections for all the posts in the Branch Committee for the term 1989 to 1992 were scheduled to be conducted between 1 July 1989 to 21 July 1989. In early June 1989 among the nominations received for the post of Chairman of the Branch Committee were 6 for one Jeeram Jayaraman of Batu Pekaka Estate (the applicant in this case). There were also 7 nominations for one S. Jayaraman of Batu Pekaka Estate and the applicant says "Jayaraman" refers to himself.

On 23 June 1989 the applicant was told that the respondent union had rejected the nomination of the applicant for the post of Chairman of the Branch Committee. On 28 June 1989 the secretary of the Branch Committee, in response to a letter from the applicant's solicitor inquiring for the reasons as to why the applicant's nomination had been rejected, stated that the respondent union was not aware that the applicant had been nominated for any post in the Branch Committee elections (see copy of letter marked as J6 in enclosure 2). As it turned out, the respondent did indeed reject the nomination of the applicant for the post of Chairman of the Branch Committee and the reasons given were that -

1. neither Jeeram Jayaram of Batu Pekaka Estate nor S. Jayaraman of Batu Pekaka Estate was a member of the respondent union;
2. the applicant had ceased to be a member of the respondent union as he had not been paying his subscriptions in accordance with the rules of the union.

The dispute arising out of the respondent union's rejection of the applicant's nomination for the post of Chairman in the Branch Committee in the 1989 election was referred to arbitration under r. 32 of the Constitution and Rules of the National Union of Plantation Workers (the Union Rules).

A complaint was filed by the applicant and the respondent union then put in a reply (see copies of the complaint and reply marked J2 in Enclosure 2).

On 14 July 1990 a panel of three arbitrators heard both parties. An undated document which was called an award (award) signed by two of the three arbitrators, was received on 9 March 1991 by the applicant (see a copy of the award marked J4 in Enclosure 2). It is this award which the applicant seeks to set aside.

Counsel for the respondent union has contended that the application before the Court is premature as the award made by the arbitrators is not final and the applicant should exhaust his domestic remedies by appealing to the Triennial Delegates' Conference in accordance with Rule 32(5) of the Union Rules which states:

> There shall be a right of appeal to the Triennial Delegates' Conference whose decision shall be binding and conclusive:
> ...

Counsel argued that s. 44 of the Trade Unions Act 1959 provides that every dispute between the parties mentioned in paragraphs (a), (b) and (c) therein (which include the applicant and the respondent union) shall be decided in the manner directed by the rules of the trade union and that the applicant being bound by his contract and the Union Rules has not made his appeal in accordance with the rules before coming to the High Court and the Court should not entertain the application to set aside the award. He cited the Privy Council case of *White and Ors. v. Kuzych* [1951] AC 588 to support his contention. It is necessary, however, that the case should be seen in the correct perspective. I set out what Goff J (as he then was) stated in respect of that case and of another case *Lawlor v. Union of Post Office Workers* [1965] 1 All ER 353 in the case of *Leigh v. National Union of Railwaymen and Anor.* [1960] 3 All ER 1249 at 1253,

> Next it was submitted on behalf of the defendants that the plaintiff is not entitled to relief because he has not exhausted or indeed embarked on the domestic remedies afforded by the rules. On this point I extract from *White v. Kuzych* in the Privy Council and *Lawlor v. Union of Post Office Workers* in this Court, two propositions. **The first is that even where there is an express provision in the rules that the plaintiff must first exhaust his domestic remedies the Court is not absolutely bound by that because its jurisdiction cannot be ousted, but the plaintiff will have to show cause why it should interfere with the contractual position.** This is consonant with the rule in the case of a submission to arbitration where the Court always has a discretion whether to stay an action but cause must be shown why it should not. The second is largely the converse of the first, namely that in the absence of such a provision the Court can readily, or at all events more readily, grant relief without prior recourse to the domestic remedies but may require the plaintiff to resort first to those remedies. ... (emphasis added)

Then again in Malaysia it has been held that where a domestic tribunal has acted beyond its jurisdiction and its decision is void, the party aggrieved should not be required to exhaust his domestic remedies before coming to Court. So opined Mohamad Azmi SCJ in a majority opinion in *B. Mahesan v. KK Lim* [1987] 2 MLJ 160 at 163 where His Lordship had the opportunity to consider *White v. Kuzych* together with *Tharmalingam v. Sambanthan* [1961] MLJ 63 and *Bonsor v. Musicians' Union* [1954] 1 All ER 822:

> This distinction between a domestic tribunal acting within and acting without jurisdiction is recognised by the Privy Council in *White v. Kuzych* and also by Thomson CJ in *Tharmalingam v. Sambanthan*. Without providing an answer, the Privy Council posed the following question at p. 598: '... is the conclusion of a judicial tribunal acting within its jurisdiction, which is arrived at in a way which amounts to a denial of natural justice, appealable, or, on the contrary, is it simply void and thus not subject to appeal at all?' There is no necessity to deal with that question in this appeal, since the disciplinary committee had acted beyond its jurisdiction and its decision was void, and as such the appellant should not be required to exhaust his domestic remedies before coming to Court. In similar circumstances in *Bonsor v. Musicians' Union* (ante) Sir Raymond Evershed MR said at p. 825:
>
> > it is true that the plaintiff did not take advantage of his right of appeal under

> the rules, but I cannot see how that affects the plaintiff's right to come to this Court and say that the purported expulsion was *ultra vires* the rules and ineffective.

In my view the applicant has shown that the so called award made by the arbitrators is void (and in the foregoing paragraphs I will discuss why I think that is so) and therefore the Court has jurisdiction to entertain the application notwithstanding that the Union Rules provide for an appeal to the Triennial Delegates' Conference and the applicant did not so appeal to that body.

Before I go further, I think it is necessary to note that earlier in 1988 the applicant had had a dispute with the respondent union which was referred by consent of both parties to a government officer, the Penolong Pendaftar Kesatuan Sekerja, under s. 44 of the Trade Union Act 1959. The dispute was whether the membership of the applicant in the respondent union had been terminated as claimed by the respondent union. The arbitrator held on 9 November 1988 that the termination of the applicant's membership in the respondent union was "*ultra vires* and void". The respondent union applied to the High Court, Penang to set aside the award but on a preliminary objection as to time-bar the application was dismissed.

I now come back to the dispute which was referred to the panel of 3 arbitrators. The applicant raised 2 issues for determination by the arbitrators and the arbitrators were clearly aware of the 2 issues which they had to determine as shown at page 1 of their award where they state:

> The complainant has in his statement of complaint dated 4 April 1990 prayed for the following:-
>
> (i) a determination that the rejection of the complainant's nomination for the post of Chairman for the 1989 Branch Committee Election is wrongful.
> (ii) a determination that the complainant's nomination be accepted.

There is a reference to a prayer "for such or other relief as deemed fit" but that is not relevant in this case.

Counsel for the applicant relies on s. 24 of the Arbitration Act 1952 to say that the award of the arbitrators should be set aside. He refers specifically to s. 24(2) which reads -

> 24 (1) ...
> (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitrator or award has been improperly procured, the High Court may set the award aside.
> (3) ...

The whole of s. 24 of the Malaysian Arbitration Act 1952 is in *pari materia* with s. 23 of the English Arbitration Act 1950. In 2 **Halsbury's Laws** (4th Edn.) 400 there is a comment relating to the grounds for remission or setting aside awards, appearing at paragraph 692, which reads (I am leaving out the footnotes):

> There are five broad grounds on which awards have been remitted to the reconsideration of the arbitrator or umpire or have been set aside. They are the following:
>
> (1) that the arbitrator or umpire has misconducted himself or the proceedings;
> (2) that there is some defect or error patent on the face of the award, as for example, where the award is uncertain or incomplete;
> (3) ...
> (4) ...
> (5) ...

As to the instances of misconduct this is what is stated at p. 402, paragraph 694 (again I omit the footnotes),

> ...
>
> ...
>
> Misconduct has been found on the following instances, some of which would also give the Court jurisdiction to intervene on other grounds:
>
> (1) **where the arbitrator or umpire fails to decide all the matters which were referred to him;**
> (2) ...
> (3) where the award is uncertain, ...
> (emphasis added)

In *Tan Toi Lam v. Lai Kee Ying* [1975] 1 MLJ 27 when an arbitrator merely ordered "I dismiss the claim" where four questions were posed to him relating to whether a deceased person who died in an accident was a workman as defined under the Workmen's Compensation Ordinance 1952, whether the accident arose out of

employment, whether compensation was payable and whether the defendant should pay the compensation, it was the view of Wan Sulaiman J (as he then was) that if the query whether the arbitrator had answered the 4 questions posed to the arbitrator had been properly brought before the Court, he (that is, Wan Sulaiman J) had no doubt the award of the arbitrator would have been set aside as the award was uncertain as 3 questions were not answered and at best only one question was answered. It was an **obiter** statement but the principle stated is sound.

In a Singapore case *Official Assignee v. Chartered Industries of Singapore Ltd*. [1978] 2 MLJ 91 Chua J had this to say about an award of an arbitrator at p. 100:

> It is obvious looking at the award that the arbitrator failed to decide on all the matters or issues referred to him. In particular he failed to decide the very questions submitted to him whether or not the notice of 16 April and the termination of the agreement on 30 April 1970, by CIS were unlawful and void as claimed by GCC. The arbitrator should have stated in his award whether the notice and the termination of the agreement were good or bad. The award is clearly defective and therefore void. I do not see any means of avoiding the consequence, which is, that the award must be set aside.

Chua J also found the award void on another ground:

> But I think the award is also defective and therefore void, on account of the award being ambiguous.

Now although in this case two questions were raised for determination by the parties and the arbitrators took cognisance of them, the arbitrator did not at all determine the issues raised.

I have gone through the document exhibited as J4 in Enclosure 2 in this case which the arbitrators have called an award. However, I have not been able to find anything resembling a determination of the questions raised or an award. There is in fact no decision made on any matter. What the document contains is what the arbitrators in the document call at p. 6 "findings of facts". They are set out below in full -

> After hearing both parties on 14 July 1990 and taking into consideration the evidence and submission submitted by both parties, the Arbitrators made the following findings of facts:
>
> 1. The Complaint arises in the months of May and June 1989 in the process of election of office bearers for 9th Triennial Representatives' Conference for the Kedah, Perlis and Penang State Branch of NUPW.
> 2. Nominations for the post of Chairman of the Branch Committee was sent out on 29 May 1989 and the closing date was 12 June 1989.
> 3. There were nominations received in the names of S. Jayaraman and Jeeram Jayaram of Batu Pekaka Estate for the post of Chairman.
> 4. The Complainant claimed that these nominations refer to him. The respondent referred to the Membership Register and showed that neither S. Jayaraman nor Jeeram Jayaraman was a member from Batu Pekaka Estate.
> 5. The complainant admitted that he ceased employment from Batu Pekaka Estate with effect from 10 November 1986. He admitted that he was employed in Vengadasalam Estate at the time of the nominations.
> 6. The complainant claimed that he was a member in benefit at the time of nominations. He produced an Arbitrators' Award by Mr. Siow Kok Leung dated 9 November 1988 and an Order of the High Court of Malaya at Penang (Originating Motion No. 25-5-1989) dated 21 June 1990 and correspondence between the complainant and the respondent and his solicitors and the respondent as evidence of his status of membership. The respondent stated that the Arbitrators Award was in relation to a dispute arising out of the termination of the complainant's membership and the High Court Order was the result of the appeal on that matter which was dismissed without being heard because of the delay in the filing of the appeal by the respondent's solicitors. The respondent also stated that payment of subscriptions must comply with Rule 18 of the NUPW Constitution and Rules. There were no provisions for accepting subscriptions otherwise and that amendments to the Constitution providing for appointment of the Secretary at the estate level for collection of subscriptions where there were less than 20 members was approved and came into force with

effect from 22 May 1989. As at May 1989, the complainant had attempted to pay his subscriptions directly but the respondent had not accepted the subscriptions as his procedure of payments was '*ultra vires*' the Constitution and the Rules of the NUPW. The Complainant's subscriptions had not been accepted by the Respondent since March 1988. As at May 1989, the Complainant had not paid his subscriptions for 15 months in compliance with the Constitution and Rules of NUPW.

7. At the State Committee Meeting held on 10 June 1990, the State Committee rejected the nominations of S. Jayaraman and Jeeram Jayaraman of the Batu Pekaka Estate as there was no such member in the Membership Register of Batu Pekaka Estate. The respondent produced the nomination forms to show that the nominations in the names received did not appear in the Membership Register of Batu Pekaka Estate.

The so called findings of fact, 7 paragraphs of them, merely narrate in summary form the submissions and the the evidence adduced on behalf of both parties which had been mostly set out, also in summary form, in the previous 5 pages of the document. Thus what was narrated in the seven paragraphs relate to the claims of the applicant and the claims of the respondent union in respect of the nomination of the applicant for the post of Chairman of the Branch Committee, the reasons which the applicant advanced for his eligibility to be nominated which included reference to the earlier arbitrator's award dated 9 November 1988, the rejection of the nomination and the reasons advanced by the respondent union which included reference to the fact that the arbitrator's award went up to the High Court on appeal but was rejected because the appeal was filed late. Reference was also made to the claim by the respondent union that payment of subscriptions (which the Union Headquarters in Kuala Lumpur refused to collect although tendered) must comply with Rule 18 of the Union Rules and that the applicant as at May 1989 had not paid his subscriptions for 15 months and that on 10 June 1990 the State Committee rejected the nomination of the applicant as there was no such member on the membership register in Membership registration of Batu Pekaka Estate.

The narration in short merely set down a gist of claims and opposing claims but there was no determination of the issues raised by the applicant. It is not surprising that the arbitrators did not determine the issues as they had not come to grips with the underlying questions relating to the legal effect of the earlier arbitrator's award and the legal effect of the Union Rules relating to payment of subscriptions and the refusal of the respondent union to accept the fees tendered by the applicant to the respondent union's headquarters. These underlying questions are by no means easy questions of law and they were not dealt with. Thus the question whether the rejection of the applicant's nomination for the post of Chairman for the 1989 election of the Branch Committee was wrongful could not and was not determined. Nor was the question whether the applicant's nomination should have been accepted determined. There were no answers and there were no conclusions drawn by the arbitrators in relation to the two questions and therefore they had misconducted themselves within the meaning of s. 24(2) of the Arbitration Act 1952; the so called award is void.

As regards the issue raised by Counsel for the applicant that the award was improperly procured because the arbitrators had ignored the award of the first arbitrator made on 9 November 1988, I have already touched on that; the issue does not arise as although the arbitrators mentioned the said award they did not make any decision on its effect on the applicant's eligibility to be nominated.

I have considered whether I should remit this matter to the arbitrators (it would appear that only two of them made the award) to reconsider the matter and my view is that I should not as the arbitrators have misconducted themselves within the meaning of s. 24(2) of the Arbitration Act 1952 and it would be pointless to do so; they have failed to deal with the underlying issues and the questions which were sought to be determined were left undetermined and it is unlikely they will be able to untangle the underlying issues which are basically legal issues. The so called award is void and I set it aside. The respondent union will pay the costs of this application.